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# In the Supreme Court of the United States

OCTOBER TERM, 1953

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**No. 568**

UNITED STATES OF AMERICA, PETITIONER

*v.*

SANDY PRAYLOU, IN HIS OWN RIGHT, AND MARION MOISE, AS GUARDIAN AD LITEM FOR SARAH LOUISE PRAYLOU, MAGGIE PRAYLOU AND EDDIE PRAYLOU; AND EDWARD WALKER

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on November 9, 1953.

## OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Eastern District of South Carolina, Columbia Division (R. 4-6, 17-19) are not reported. The opinion of the Court of Appeals (R. 21-26) is reported at 208 F. 2d 291.

JURISDICTION

The judgments of the Court of Appeals were entered in both cases on November 9, 1953 (R. 26-27). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a state statute providing for absolute liability without fault constitutes an adequate basis, under the Federal Tort Claims Act, for the recovery of damages resulting from a military plane crash.

STATUTES INVOLVED

1. The Federal Tort Claims Act, as codified in 28 U.S.C. 1346(b), 2674, and 2680(a), provides in pertinent part:

> 1346(b). Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2674. The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2680(a). The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

2. Section 2-6, South Carolina Code (1952), imposing absolute liability on the owner of aircraft, provides:

> The owner of every aircraft which is operated over the land or waters of this State is absolutely liable for injuries to persons or property on the land or water beneath caused by ascent, descent or flight of the aircraft or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured or of the owner or bailee of the property injured. * * *.

STATEMENT

These two cases, the *Praylou* case and the *Walker* case, were brought under the Federal Tort

Claims Act and arise out of two separate Air Force plane crashes:

1. *Praylou case.* Shortly after noon on August 16, 1951, a B-26 Air Force plane crashed upon Praylou's land in South Carolina, destroying his barn and two smaller structures (R. 5). Burning fuel from the crashing plane also caused personal injuries to his three children, who were then near the barn (R. 5).

This action was instituted in the United States District Court for the Eastern District of South Carolina, Columbia Division, by the filing of a Federal Tort Claims Act complaint which asserted that "liability for said damages as hereinabove set forth is imposed on the defendant, the United States of America, as owner of the said airplane under the provisions of Section 7104 of Code of Laws of South Carolina, 1942" (R. 2).[1] The United States admitted that the plane crashed on Praylou's land and stipulated that the plane was owned by the United States and operated by an Air Force pilot acting within the scope of his employment at the time of the accident (R. 3-4). The Government's answer, however, denied that it could be held liable under Section 7104, South Carolina's absolute liability statute, for the resulting damages (R. 3).

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[1] Section 7104 of the South Carolina Code imposes absolute liability upon the owner of aircraft for injuries caused by the plane to persons or property on the land, irrespective of negligence on the part of the owner or of the pilot. Section 7104 was recodified, without any change of language here material, in the 1952 South Carolina Code as Section 2-6, *supra*, p. 3.

At the trial, the only evidence offered concerned the occurrence of the crash and the extent of the children's personal injuries and Praylou's property damage.

2. *Walker case.* On October 18, 1951, a different Air Force plane crashed and struck the ground in Sumter County, South Carolina, within a few feet of a house outside of which Walker was working (R. 17-18). To avoid being struck by the crashing plane, he ran from his work and collided with an iron truck body in his path (R. 18).

As in the *Praylou* case, the *Walker* action was instituted in the United States District Court for the Eastern District of South Carolina, Columbia Division, by the filing of a complaint against the United States under the Federal Tort Claims Act (R. 15). The answer of the United States, as in the other case, admitted the crash of the Air Force plane piloted by an Air Force officer acting within the scope of his employment, but denied liability (R. 16-17).

At the trial, Walker's only evidence concerned the occurrence of the crash and the extent of his personal injury. Before resting, his counsel called the district court's "attention to the South Carolina Code of Laws, Section 7104. (1952 Code, Volume 1, Section 2-6)" and read to the court the full text of this statute (R. 17), see *supra,* p. 3. After reading this statute to the court, counsel pointed out that "under the pleadings, it is admitted that this was an official flight, and in the scope of his employment. That is under paragraph 6 of the answer.

That is admitted. We have nothing further to offer" (R. 17).

After the trial of both the *Praylou* and *Walker* cases, the district court made findings limited to the occurrence of the crash and the extent of the respective plaintiffs' injuries and damages (R. 4-6, 17-18). No findings of any negligence on the part of any federal employee were made in either case. Instead, the district court, relying in both cases on Section 2-6 of the South Carolina statute which makes "the owner of every aircraft * * * absolutely liable for injuries [caused by the plane] to persons or property on the land * * *, whether such owner was negligent or not," awarded judgment for a total amount of $28,413.83 in the Praylou case and $1,500 to Walker (R. 7-9, 19). The Court of Appeals for the Fourth Circuit affirmed the judgments in both cases, stating "that the federal tort claims act was intended to cover cases involving liability [without fault]" (R. 24).

## Reasons for Granting the Writ

The Court of Appeals' holding that the principle of strict liability without fault may be invoked as a basis for recovering damages from the United States under the Federal Tort Claims Act calls for review and reversal by this Court. This holding on an issue of far reaching importance in the administration of the Act is in square conflict with *Dalehite* v. *United States*, 346 U. S. 15, flying in the face of this Court's express ruling that the Act does not extend to situations of liability without fault. In

addition, the ruling below conflicts with the decisions of all of the other four courts of appeals which have dealt with this issue, both before and after this Court's opinion in *Dalehite*.

1. 28 U. S. C. 1346(b) conditions governmental liability under the Federal Tort Claims Act on the "negligent or wrongful act" of a government employee. *Supra*, p. 2. In *Dalehite* v. *United States*, 346 U. S. 15, this Court, adhering to that language of the Act, directly rejected the contention that the doctrine of absolute liability without fault may be invoked as a basis for recovering damages under the Federal Tort Claims Act (346 U. S. 15, 44-45):

> * * * *there is yet to be disposed of some slight residue of theory of absolute liability without fault.* This is reflected both in the District Court's finding that the FGAN constituted a nuisance, and in the contention of petitioners here. *We agree with the six judges of the Court of Appeals, 197 F. 2d 771, 776, 781, 786, that the Act does not extend to such situations, though of course well known in tort law generally.* It is to be invoked only on a "negligent or wrongful act or omission" of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. *So it*

*is our judgment that liability does not arise by virtue either of United States ownership of an "inherently dangerous commodity" or property, or of engaging in an "extra-hazardous" activity. United States* v. *Hull,* 195 F. 2d 64, 67. [Emphasis added.]

While the dissenting opinion in *Dalehite* (346 U. S. 47-60) expresses disagreement with all other aspects of the *Dalehite* decision, it is significant that the dissent found no fault with the majority's ruling that the theory of absolute liability cannot be used as a basis for a Tort Claims Act recovery.[2]

[2] We believe that the *Dalehite decision* is completely dispositive of the issue presented by this petition. It is nevertheless appropriate to note that legislative reports concerning 28 U. S. C. 2680(a), part of the original Federal Tort Claims Act, fully support the holding that strict liability without fault was not to be imposed on the United States. Section 2680(a) excludes claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee." *Supra,* p. 3. In the 77th Congress, the Senate proposed the express exemption of nuisances not involving negligence. The House Committee rejected the proposed specific exception because the general exclusionary language of Section 2680(a) would automatically exclude non-negligent authorized acts "which might constitute a nuisance if done by a private person" (H. Rept. No. 2245, 77th Cong., 2d Sess., p. 12). And the 79th Congress emphasized that Section 2680(a) was adopted so as to "preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity * * * *where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious* * * *." H. Rept. No. 1287, 79th Cong., 1st Sess., p. 5. (emphasis added) The assumption by the court below that strict liability without fault could be imposed on the United States under the South Carolina code, even though no government employee was negligent, solely because an airplane crash would subject a private airplane owner to liability, pays no heed to this clear congressional declaration.

Earlier, as shown by the *Dalehite* reference to the *Hull* case, the Court of Appeals for the First Circuit had reached the same conclusion. There, Judge Magruder, writing for a unanimous court, stressed the fact that "the waiver of sovereign immunity under the Federal Tort Claims Act is not unlimited," and that while "under local law a private person may be liable without fault * * * the United States would not be subject to suit on such a liability." *United States* v. *Hull,* 195 F. 2d 64, 67. The full bench of the Fifth Circuit, as this Court has noted, *supra,* p. 7, had made the same ruling in its decision in the Texas City litigation, 197 F. 2d at 776, 781, 786. Since the *Dalehite* decision, this Court's holding that the Federal Tort Claims Act does not extend to liability without fault has been accepted and applied by the Third, Fifth, and Tenth Circuit Courts of Appeals. *Heale* v. *United States,* 207 F. 2d 414 (C. A. 3); *United States* v. *Inmon,* 205 F. 2d 681, 684 (C. A. 5); *Harris* v. *United States,* 205 F. 2d 765, 767 (C. A. 10). The instant decision is in conflict with all of these court of appeals cases, as well as with *Dalehite.*[3]

The opinion below not only fails to follow *Dalehite,* but is based on reasoning directly repudiated by this Court in that case. In holding that damages are recoverable under the Federal Tort Claims Act on the basis of the principle of absolute liability which is incorporated in South Carolina's statute

[3] Instead of following *Dahehite,* the Fourth Circuit seems to be adhering to its earlier view (*D'Anna* v. *United States,* 191 F. 2d 335, 337) that operators of airplanes are absolutely liable for crashes (See R. 23).

with respect to airplane crashes, the Fourth Circuit reasons that an airplane crash in South Carolina constitutes a "wrongful" act and therefore falls within the language of the Tort Act predicating liability on the "negligent or *wrongful*" act of a government employee (emphasis added).[4] But this identical reasoning was advanced and specifically rejected in the *Dalehite* opinion (346 U. S. 15, 45):

> Petitioners rely on the word "wrongful" though as showing that something in addition to negligence is covered. This argument, as we have pointed out, does not override the fact that the Act does require some brand of misfeasance or non-feasance, and so could not extend to liability without fault; in addition, the legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of the absolute liability theory.[5]

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[4] The district court's conclusions of law, handed down before the *Dalehite* opinion, were apparently based on the same assumption that the word "wrongful" was broad enough to include claims based on the absolute liability theory. Thus, the court's conclusion quoting from Section 1346(b) of the Federal Tort Claims Act, *supra*, p. 2, stated that the damages to respondents were "caused by the negligent, *or wrongful* act or omission of an employee of the Government while acting within the scope of his office or employment" (R. 6, 18) (emphasis added). It should be noted that the district court's use of the word "negligent" in this conclusion of law resulted simply from its paraphrasing of the statutory language. There is absolutely no evidence of any negligence whatsoever in the record, and neither of the courts below made any factual finding of negligence on the part of any government employee. See *infra*, note 7, page 12.

[5] The *Dalehite* opinion further points out that "rather" than incorporating the absolute liability theory as a basis for recovery of damages under the Tort Claims Act, the word

No more convincing is the other argument in the opinion below that "it would be absolutely absurd to hold that the government is liable under the Tort Claims Act for the act of an employee who crashes into a house with a truck but not liable if he crashes into it with an airplane, and this on the theory that there is absolute liability under state law in the latter case but not in the former" (R. 26). This wholly misconceives the Government's position. That the Government may be held liable under the Tort Claims Act for the negligent act of an employee where there is a crash into a house either with a truck or with an airplane is, of course, freely conceded. However, where employees—whether the case be that of a truck or of a plane—are not at fault, it is our position that the United States cannot be held liable for the non-intentional and non-negli-

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"wrongful," as used in the Act, had a "much narrower inspiration: 'trespasses' which might not be considered strictly negligent. Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess., 43-44." 346 U. S. 15, 45. Thus, as pointed out at page 241, note 82, in the Government's brief filed here in the *Dalehite* case, "a small class of individual torts, like *deliberate* trespass to property, which are non-negligent" (emphasis added) would be covered by the Act. The damage to property in the instant cases was not only non-negligent but not deliberate and would not therefore be actionable as a trespass. This fully accords with the general contemporary rule that, apart from the absolute liability attaching to the conduct of an extrahazardous activity, there is no liability for an unintentional and non-negligent invasion of property, even where harm results. *Edgarton* v. *H. P. Welch Co.*, 321 Mass. 603, 612, where the court stated: "The trend of modern authority is that an unintended intrusion upon the land in possession of another does not constitute a trespass." Accord: *Feiges* v. *Racine Dry Goods Co.*, 231 Wis. 270, 275 (holding that "Where there is no intentional, no voluntary act, there is no tort, no trespass"); *Durst* v. *Wareham*, 132 Kan. 785, 789;

gent act of crashing.[6] In other words, imposition of liability on the United States in the truck situation is based simply on negligence in the driving or maintenance of the truck. Similarly, it is only because of a failure to show such negligence that the Government cannot be held liable for a non-negligent or unintentional airplane crash. If respondent had shown and the court had found negligence, these cases would have been entirely different and recovery would have been proper; the South Carolina absolute liability statute would not preclude recovery for negligence under the common law. See e.g. *Parcell* v. *United States,* 104 F. Supp. 110 (S. D. W. Va.).[7]

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*Puchlopek* v. *Company,* 82 N. H. 440, 442; *Gayler & Pope, Ltd.* v. *B. Davies & Son, Ltd.* [1924] 2 K. B. 75, 76-81. This accepted rule is also embodied in the *Restatement of Torts,* which declares (Section 166): "Except where the actor is engaged in an extra-hazardous activity, an unintentional and non-negligent entry on land in the possession of another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest." In *United States* v. *Gaidys,* 194 F. 2d 762 (C. A. 10), the court characterized an airplane crash as in the nature of a "trespass", but only because the government plane was negligent in flying at an unsafe altitude immediately before the crash.

[6] There appear to be federal statutes, however, authorizing administrative payment, to a limited extent, for "damages to persons and private property resulting from the operation of aircraft." Act of June 30, 1922, 42 Stat. 737. The administrative settlement provisions of this 1922 statute were later incorporated into the Military Claims Act of 1943 (57 Stat. 372; 31 U. S. C. 223b), and now authorize limited payment of claims based on the liability without fault principle.

[7] In addition to the fact that the record discloses no negligence and that neither the district court nor the court of appeals even suggested that there was any negligence on the

2. The question presented here recurs constantly in the heavy volume of litigation against the United States under the Federal Tort Claims Act. The clear conflict between the decision below, on one hand, and this Court's *Dalehite* decision and those of the First, Third, Fifth, and Tenth Circuits, on the other hand, will doubtless result in uncertainty and difference in treatment of similar cases by the district courts. Only by review and reversal of the decision below on the authority of *Dalehite* will that doubt and lack of uniformity be eliminated.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
*Acting Solicitor General.*

FEBRUARY, 1954.

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part of any government employee (*supra*, note 4, page 10), it is important to note that the general inference of negligence arising from the *res ipsa loquitur* rule clearly had no application in the instant cases because that "rule * * * does not obtain" in South Carolina. *Daniels* v. *Timmons*, 216 S. Car. 539, 59 S. E. 2d 149, certiorari denied, 340 U. S. 841; *Eickhoff* v. *Beard-Laney, Inc., et al.*, 199 S. Car. 500, 20 S. E. 2d 153. Even in those states where the *res ipsa loquitur* rule *does* obtain, many of the courts which have considered the problem have held *res ipsa loquitur* inapplicable in suits for damages resulting from airplane crashes. See *Prosser on Torts* (1941 ed.), p. 296.

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